Supreme Court, U.S.
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No. 97-479

In The

Supreme Court of the United States

October Term, 1996

STROH DIE CASTING CO.,

Petitioner,

vs.

ATLANTIC STATES LEGAL FOUNDATION, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Does the federal court have jurisdiction over a citizen suit under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, where the citizen-plaintiff's notice of intent to sue identified the defendant's discharge of die casting process wastewater to the local sanitary sewer system in violation of the categorical standards of 40 C.F.R. Chapter 464, where the defendant's discharges were not in compliance prior to the filing of suit, where the defendant continued its discharges after suit was commenced, and where the defendant's remedy for the noncompliance was a pretreatment system which was not put into operation until more than 6 weeks after suit was filed and was not effective to achieve compliance until approximately one year had passed?

2. Does the federal court's jurisdiction over a citizen suit under the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.*, extend to post-suit violations at an outfall or sampling location not specifically identified in the citizen-plaintiff's notice of intent to sue, where instead of bringing its discharges into compliance before suit was commenced, defendant waited for more than six weeks after suit was filed before installing a pretreatment system, at which time defendant began discharging the wastewater to the sanitary sewer system at a newly defined outfall, where the pretreatment system was not able to achieve consistent compliance until approximately another year had passed?

STATEMENT PURSUANT TO RULE 29.6

There are no parents or subsidiaries of Atlantic States Legal Foundation, Inc.

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I

STATEMENT OF THE CASE

This is a citizen suit brought by plaintiff Atlantic States Legal Foundation, Inc. ("Atlantic"), under the Clean Water Act, 33 U.S.C. § 1365. Plaintiff seeks relief for defendant Stroh Die Casting Co., Inc.'s ("Stroh") repeated pre- and post-complaint violations of permit limitations and federal regulations. Stroh discharges pollutants from its Milwaukee facility into Bluemound Tributary of the Menomonee River pursuant to a permit issued by the Wisconsin DNR. (AA-5; AA-26).[1] On November 8, 1988, Atlantic gave notice of Stroh's alleged violations of its DNR discharge permit as required by 33 U.S.C. § 1365(b). (AA-3; AA-14-20; AA-25) .

At some point in time, Stroh began discharging some of its wastewater via the local sanitary sewer system to the Milwaukee Metropolitan Sewerage District ("MMSD"), which discharges from its treatment works into Lake Michigan. (AA-8; AA-27). On April 13, 1989, Atlantic gave notice of Stroh's alleged violations relating to its discharges to MMSD, as required by the Act. (AA-3; AA-21-23; AA-25). That notice stated in relevant part:

> Atlantic . . . will file a civil action in federal district court, or amend the civil action already filed.
>
> This lawsuit will allege that the Milwaukee County plant of Stroh Die Casting Company, Inc., which discharges

1. References to the record are as follows: references to pages of Petitioner's Appendix are denoted (A-__, B-__, or C-__); references to the separately bound Appellant's Appendix before the Seventh Circuit are denoted (AA-__); and references to any other parts of the record are denoted (Rec.-*docket #*, and page).

> process water into Lake Michigan via the Milwaukee Metropolitan Sewerage District, and which is located in Milwaukee, Wisconsin, has violated and continues to violate an "effluent standard or limitation," by discharging die casting process wastewater to MMSD since October 31, 1988, without a pretreatment discharge permit and in violation of the categorical standards set forth in 40 C.F.R. Chapter 464. . . .

After itemizing a series of specific violations of effluent limitations at Outfall 3, the notice went on to state:

> Notifier believes and alleges that a history of effluent standard violations has continued from before the violations listed to the present. Discharger's records certify that its discharges were not in compliance as of January 31, 1989, and state that discharger proposed not to achieve compliance until January 10, 1990. Such violations are known to the Discharger and may be included in future legal actions by Notifier.

(AA-21-22).

After receiving Atlantic's notice that Stroh was unlawfully discharging its die casting process wastewater to MMSD without a pretreatment discharge permit, Stroh obtained such a permit from MMSD on July 28, 1989. It authorized Stroh to discharge die casting wastewater to MMSD through Stroh's Abcor treatment unit, with discharges to be measured at the Abcor unit sump pit defined as outfall 3, subject to specified effluent

limitations. The MMSD permit defined the sump pit for the parts washer and deburring operation as outfall 4.0. (AA-42-46).

An initial complaint brought by Atlantic, relating only to violation of the DNR permit, was dismissed without prejudice by District Judge Robert W. Warren on the court's own motion on November 14, 1989, because it appeared that neither party wished to go forward with the matter. (AA-33-38).

On May 7, 1990, Atlantic filed an amended complaint, adding allegations of subsequent violations, including those relating to Stroh's discharges to MMSD. On May 8, 1990, Judge Warren reopened this case. Stroh moved to vacate the order reopening the case and to dismiss the amended complaint. On April 16, 1992, Judge Warren denied Stroh's motions. Cross-motions for summary judgment were filed and briefed later that year.

Stroh's MMSD discharge monitoring summary showed violations of the zinc discharge limitations at outfall 3 in June 1989 and October 1989. (AA-55). On April 18, 1990, MMSD issued a notice of violation to Stroh for its failure to have adhered to a compliance schedule for installation of pretreatment facilities:

> Plans and specifications that were to have been submitted to the DNR to allow for their review by January 26, 1990 were not received by DNR until March 9, 1990. Installation of the pretreatment system was scheduled for March 29, 1990 with compliance by April 10, 1990. However DNR approval of plans and specifications was not received until March 30, 1990 and installation and compliance is not expected until late May.

(AA-56).

On May 29, 1990, Stroh wrote MMSD, explaining why Stroh had failed to meet the April 10, 1990 deadline for start up of the wastewater treatment system with which Stroh hoped to achieve compliance with its permit and with the categorical standards which the permit implemented. Stroh stated:

> We realize that we are behind schedule again. The problems that we encountered after our May 4th meeting were unforeseeable and directly responsible for delaying start-up until May 30th, the date by which we were supposed to be in compliance. Once start-up occurs though we anticipate no further problems and hope to be in compliance within a week.

(AA-58-59).

Effective July 1, 1990, Stroh abandoned MMSD outfall 3 and discharged all its industrial process wastewater through what became defined in October 1990 as MMSD outfall 4, defined as the sampling station located downstream of its pretreatment system. (AA-65-66). Stroh's August 28, 1990 baseline monitoring report regarding operation of the new pretreatment system stated that Stroh's die casting wastewater "is pumped through an Abcor ultrafiltration unit to remove oil and grease. The filtered effluent from the Abcor unit is then pumped to the new wastewater pretreatment system to remove the zinc and phenols." (AA-82). The Baseline Monitoring Report included a facility diagram confirming that the Abcor Unit discharge was now rerouted to outfall 4, where Stroh repiped its process wastewater to a single outfall. (AA-94). After reporting that all three samples taken of the new system's discharges during July 1990 were in violation of one or more effluent limitations (zinc, lead and phenols), Stroh's President and its consulting engineer certified:

> The data submitted in this report shows that the process wastewater generated at Stroh Die Casting is not consistently in compliance with applicable discharge standards. This information is, to the best of my knowledge and belief, true, accurate, and complete.

(AA-89, 91-92).

Stroh's discharges from its new pretreatment system, at newly defined outfall 4, continued to intermittently violate its permit limitations, and MMSD issued a notice of noncompliance to Stroh on March 27, 1991, relating to discharges in October 1990, November 1990 and January 1991. A subsequent notice of noncompliance was issued on June 24, 1991, relating to a discharge on May 13, 1991, in excess of the zinc limitation. (AA-95-98; AA-101-102). Stroh did not dispute that it was in noncompliance, and wrote MMSD on July 9, 1991, describing its efforts "to alleviate" the cause of the May 13, 1991 exceedance of its permit limits. The letter stated that the equipment which Stroh planned to use to deal with the problem was scheduled to be installed by July 31, 1991. (AA-99-100; AA-103-104).

As a result of Stroh's noncompliance, MMSD published a notice in the *Milwaukee Journal* on March 29, 1992, which lists Stroh as one of 15 industrial users which were in significant noncompliance during 1991, pursuant to the criteria of applicable regulations. (AA-110).

Meanwhile, Stroh continued to discharge *nonprocess* water to the storm sewer pursuant to its DNR permit. In its Discharge Monitoring Report (DMR) received by the DNR on April 16, 1992, Stroh reported discharging 11 milligrams per liter of oil and grease at DNR storm sewer outfall 003 on February 6, 1992,

compared to the 10 milligrams per liter daily maximum limit of its permit. Stroh alleged that the sample result was in error, and the DMR contained the following notation: "Note: Attached lab report shows lab process error." (AA-107). However, no such report was found in the DNR file. (Rec. 26, p. 8). To support its assertion that the lab report was in error, Stroh submitted a letter from the lab *dated May 13, 1992*. The letter stated in relevant part:

> As part of the method, an oil standard of known concentration is analyzed along with the samples to determine the accuracy of the analyses. The standard that was run on February 27 had a recovery of 50%. This is below our acceptance level. This could indicate that there was a problem with the O&G analyses that day, meaning that the results for your two samples tested that day may not be accurate.

(AA-108). On March 22, 1996, District Judge Rudolph T. Randa granted Stroh's motion and denied Atlantic's motion. The district court ignored Stroh's continued discharges at MMSD outfall 3 for more than six weeks after the amended complaint was filed, during a period when Stroh had admitted its inability to comply with the categorical standards, and ruled that Stroh's discharges at MMSD outfall 4 were beyond the scope of Atlantic's notice and therefore not part of the action. For those reasons, the district court held that Stroh was not an ongoing violator with respect to discharges to MMSD. With respect to Stroh's discharges to the Bluemound Tributary regulated by the DNR, the district court held that a "faulty" lab test could not be the basis for a violation, ignoring that the lab's letter indicated that the sample report probably *understated* the actual concentration of oil and grease in the sample. Judgment of dismissal was entered the same date.

On appeal, the Seventh Circuit found that Atlantic's pre-suit notice fully complied with the requirements of the Act and regulations. It further found that the notice was sufficient to encompass Stroh's post-complaint discharges of die casting wastewater at newly numbered outfall 4, and that "the violation had certainly not ceased by the time the amended complaint was filed." (B-12). With respect to the discharges at DNR outfall 3, the Seventh Circuit found the district court to have erred in granting summary judgment to Stroh on disputed facts. (B-14). Accordingly, the Seventh Circuit reversed the decision of the district court and remanded the case.

REASONS FOR DENYING THE WRIT

I.

THE SEVENTH CIRCUIT'S READING OF THE CLEAN WATER ACT NOTICE REQUIREMENT IS NOT IN CONFLICT WITH *HALLSTROM v. TILLAMOOK COUNTY* OR WITH THE DECISIONS OF OTHER CIRCUITS.

The petition asserts that the Seventh Circuit's decision conflicts with the court's interpretation of the notice requirement in *Hallstrom v. Tillamook County*, 493 U.S. 20, 26, 110 S. Ct. 304, 308-09, 107 L. Ed. 2d 237 (1989), *reh'g denied*, 493 U.S. 1037, 110 S. Ct. 761 (1990), and with the decisions of other circuits. In fact, as the Seventh Circuit correctly noted, *Hallstrom* "said nothing about the content of the notice." (B-9). There is no contention here that Atlantic failed to send its notice to any of the parties entitled to receive it, or failed to wait the required 60 days before filing suit, and there is no conflict with *Hallstrom*.

Nor does this case raise any conflict between the circuits. In *Washington Trout v. McCain Foods, Inc.*, 45 F.3d 1351 (9th

Cir. 1995), the Ninth Circuit affirmed dismissal because the pre-suit notice failed to adequately identify the organizations which brought the suit as plaintiffs, as required by 40 C.F.R. § 135.3(a). There is no contention here that Atlantic failed to meet these requirements, and no conflict with *Washington Trout*.

Petitioner argues that this case conflicts with *Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 50 F.3d 1239, 1249 (3rd Cir. 1995), which held that both pre-suit and post-complaint violations of the same type (same parameter, same outfall) as a violation included in the plaintiff's notice letter may be included in the citizen suit. The Third Circuit reasoned that such violations were related to or represented a continuation of violations identified in the notice, and that their inclusion in a citizen suit was required by the concept of "complete compliance" underlying *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 108 S. Ct. 376, 98 L. Ed. 2d 306 (1987). In short, the Third Circuit recognized that " 'complete compliance' should incorporate the correction of all such interconnected violations." *Hercules*, *supra* at 1252.

Petitioner complains that the Seventh Circuit has gone beyond or abandoned the Third Circuit's "outfall-by-outfall" approach. In *Hercules*, one of defendant's outfalls discharged to the Delaware River, the other to Clonmell Creek. 50 F.3d at 1242. Achieving complete compliance at an outfall would therefore have required the defendant to bring all of its discharges into a particular waterway into compliance. Here, more than six weeks after the complaint was filed, Stroh diverted its contaminated wastewater from one outfall to another, without bringing its discharges to the sanitary sewer system into compliance. While the outfall or sampling point changed, Stroh's contaminated wastewater continued to be discharged into the same sanitary sewer system both before and after the diversion.

Under these circumstances, the Seventh Circuit appropriately treated Stroh's post-complaint discharges at outfall 4 as related to or interconnected with the pre-complaint discharges identified in Atlantic's notice:

> We do not read the Third Circuit as establishing an inflexible rule that would require outfall-by-outfall notice in all cases. It was not faced with a case where the alleged polluter, upon receiving a notice about one offending outfall, simply redirected the stream of contaminated water to another outfall. The key to notice is to give the accused company the opportunity to correct the problem. Here, there is no question that Atlantic's April 1989 notice sufficiently informed Stroh about Atlantic's claim that its handling of the die casting wastewater did not comply with the statute. Stroh promptly secured a permit that covered exactly these discharges, under the outfall numbered 3 in the first MMSD permit. It began construction of a treatment facility, which it completed in June of 1990 (at least a month *after* the amended complaint was filed.). It then re-routed the very same die casting wastewater to its newly numbered outfall 4. Moreover, it admitted in its May 29, 1990 letter to the MMSD that it was not in compliance and attempted to explain why it missed its deadline for its wastewater treatment system. These are not the actions of a company that has not received enough information for purposes of the statutory notice provisions of the Act.

(B-10).

Petitioner further asserts that this case conflicts with *Atlantic States Legal Foundation v. United Musical Instruments*, 61 F.3d 473 (6th Cir. 1995), which applied the notice requirements of the Emergency Planning and Community Right to Know Act of 1986 ("EPCRA"). The Sixth Circuit held that EPCRA did not allow a citizen suit for past failures to file toxic release reporting forms that had been cured by filing of the forms before commencement of the action.[2] The Sixth Circuit further decided that the plaintiff's pre-suit notice referring to defendant's violation of reporting duties for calendar years 1987-1990 did not provide jurisdiction for plaintiff to sue for violation of the defendant's *independent* reporting duty for calendar year 1991.

Whether the Sixth Circuit was correct in finding that a defendant's duty to file a report *under EPCRA* in a subsequent year needed to be separately noticed is not at issue in this *Clean Water Act* case. Regardless of whether the Sixth Circuit decision under EPCRA is correct, there is no conflict between it and the Clean Water Act cases decided by the Third and Seventh Circuits.

Unlike the independent pre-suit 1991 reporting violation found to be outside the scope of the EPCRA notice in *United Musical Instruments*, Stroh's post-complaint discharges at MMSD outfall 4 were related to and interconnected with the pre-complaint discharges identified in Atlantic's Clean Water Act notice. The post-complaint discharges represented nothing less than the continuation of Stroh's discharge of die casting process wastewater to MMSD in violation of Clean Water Act categorical standards — simply at a newly-defined sampling location, retroactively defined in October 1990 as "outfall 4".

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2. Interpretation of EPCRA's citizen suit provision is before the Court in Docket 96-643, reviewing *Citizens for a Better Environment v. Steel Co.*, 90 F.3d 1237 (7th Cir. 1996), *cert. granted*, __ U.S. __, 117 S. Ct. 1079, 137 L. Ed. 2d 214 (1997).

They represented Stroh's ongoing, continuing violation, which continued long after suit had been commenced.

The Court noted in *Gwaltney* that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." 484 U.S. at 60, 108 S. Ct. at 383. The defendant in *Gwaltney* was concerned that failure to require proof rather than allegations of ongoing violations would permit citizen-plaintiffs whose allegations of ongoing noncompliance become false at some point in the litigation, because the defendant begins to comply with the Act, to nevertheless press their suit to conclusion. The Court's response to this concern recognized that "complete compliance" is not achieved unless all violations connected to the noticed violations have been remedied:

> Longstanding principles of mootness, however, prevent the maintenance of suit when "there is no reasonable expectation that the wrong will be repeated." In seeking to have a case dismissed as moot, however, the defendant's burden "is a heavy one." The defendant must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." Mootness doctrine thus protects defendants from the maintenance of suit under the Clean Air Act based solely on violations wholly unconnected to any present or future wrongdoing, while it also protects plaintiffs from defendants who seek to evade sanction by predictable "protestations of repentance and reform." (citations omitted)

Gwaltney, *supra*, 484 U.S. at 66, 108 S. Ct. at 386.

The concurring opinion of Justice Scalia, in which Justices Stevens and O'Connor joined, provides further insight into what it means for a defendant "to be in violation" of the Clean Water Act on the day suit was brought. That opinion provides further support for the Third and Seventh Circuit's inclusion within the scope of a citizen suit of violations which are related to or interconnected with the violations in the pre-suit notice. Justice Scalia wrote:

> In my view, therefore, the issue to be resolved by the Court of Appeals on remand of this suit is not whether the allegation of a continuing violation on the day suit was brought was made in good faith after reasonable inquiry, but whether the petitioner was in fact "in violation" on the date suit was brought. The phrase in Sec. 505(a), "to be in violation," unlike the phrase "to be violating" or "to have committed a violation," suggests a state rather than an act — the opposite of a state of compliance. A good or lucky day is not a state of compliance. Nor is the dubious state in which a past effluent problem is not recurring at the moment but the cause of that problem has not been completely and clearly eradicated. When a company has violated an effluent standard or limitation, it remains, for purposes of Sec. 505(a), "in violation" of that standard or limitation so long as it has not put in place remedial measures that clearly eliminate the cause of the violation. It does not suffice to defeat subject matter jurisdiction that the success of the attempted remedies becomes clear months or even weeks after the suit is filed. Subject matter

> jurisdiction "depends on the state of things at the time of the action brought"; if it existed when the suit was brought, "subsequent events" cannot "oust[]" the court of jurisdiction.
>
> * * *
>
> Thus, I think the question on remand should be whether petitioner had taken remedial steps that had clearly achieved the effect of curing all past violations by the time suit was brought.

Id., 484 U.S. at 69-70, 108 S. Ct. at 387-88.

Here, Stroh was not able to bring its die casting process wastewater discharges into compliance with categorical standards until more than a year after Atlantic's amended complaint was filed. Until then, while Stroh had obtained a permit, it had not achieved complete compliance for the violations in Atlantic's notice — it was still unable to meet the limitations established by the permit and by categorical standards. For more than six weeks after the complaint was filed, Stroh's die casting process discharges continued to go to the sanitary sewer system through outfall 3; thereafter they went to the sanitary sewer system through outfall 4, which wasn't even defined in Stroh's permit for several additional months. The Seventh Circuit's ruling that those discharges were within the scope of Atlantic's citizen suit correctly follows this Court's guidance in *Gwaltney* and does not conflict with *Hallstrom* or the decisions of other circuits.[3]

3. Review of the "jurisdictional" issue presented by Stroh relating to the scope of Atlantic's notice regarding discharges to MMSD would affect only the scope of this action, not the district court's jurisdiction (Cont'd)

II.

PETITIONER'S INTERPRETATION OF THE NOTICE REQUIREMENT WOULD HAVE BEEN IMPOSSIBLE FOR ATLANTIC TO HAVE COMPLIED WITH, AND WOULD ENABLE POLLUTERS TO INSULATE THEMSELVES FROM CITIZEN SUITS SIMPLY BY SHIFTING THEIR ILLEGAL POLLUTION TO A DIFFERENT OUTFALL OR SAMPLING LOCATION, WITHOUT CURING OR ERADICATING THE POLLUTION ITSELF.

Petitioner argues that Atlantic's notice was required to identify outfall 4 as the location of Stroh's post-complaint violations in order to include them in its citizen suit. The regulation in question, 40 C.F.R. § 135.3(a), actually only requires sufficient information to enable *the recipient* to identify the location, which the notice did provide. Moreover, Stroh's argument would lead to absurd results.

The petition asserts at page 15 that "before Atlantic States filed its amended complaint in May, 1990, it could have noticed the violations it now claims — and Stroh, the EPA, and the DNR

(Cont'd)

over the action. There is no dispute that Stroh's post-complaint discharges at outfall 3 are within the scope of Atlantic's notice. As the record indicates, Stroh was unable to bring its die casting wastewater discharges into complete compliance for more than a year after the amended complaint was filed. Clearly, based on Stroh's failure to remedy the cause of its unlawful discharges at outfall 3, Stroh was "in violation" at outfall 3 on the date the amended complaint was filed and for more than six weeks later. Thus, the district court has jurisdiction over this case, based on the outfall 3 discharges alone, regardless of whether the outfall 4 discharges are included. In addition, Atlantic's claims relating to Stroh's unlawful discharges to the Bluemound tributary of the Menomonee River, as regulated by its Wisconsin DNR permit, remain for adjudication.

could have addressed them before suit." In fact, any notice before July 1, 1990 alleging die casting wastewater discharge violations at "outfall 4" would have been in error, and any such notice before October 1990 would have required Atlantic to be clairvoyant. It wasn't until July 1, 1990 that Stroh abandoned outfall 3, rerouted its die casting wastewater through the newly-installed pretreatment system, and began to discharge die casting wastewater through "outfall 4." Stroh's permits from the sewerage district didn't even define the new outfall 4 until October 1990.[4] No enforcement action could have been taken by government agencies relating to die casting wastewater discharges at outfall 4 before the amended complaint was filed for precisely the same reason — there weren't any such discharges there until July 1, 1990.

No purpose is served by requiring Atlantic, or other citizen-plaintiffs, to correctly guess in advance either the locations to which polluters will decide to pipe their unlawful post-complaint discharges or the specific numbers which regulators may assign in the future to monitoring or sampling locations. Moreover, under Stroh's argument regarding notice, all any polluter need do to bar a citizen suit is to call a plumber and shift its illegal pollution to a different outfall — without curing or eradicating the pollution itself. With enough pipes and enough plumbers, any polluter could insulate itself from citizen enforcement forever. These results are contrary to the language of the Clean Water Act, to the requirements of the implementing regulation, and to the Court's guidance in *Gwaltney*. Nevertheless, those are the results of petitioner's arguments for review.

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4. Compare the 1989 definitions of outfalls 4.0, 4.1, and 4.2 with the October 1990 definition of outfall 4. (B-4 and B-5). The sewerage district could just as easily have decided in October 1990 to renumber the "surviving" Stroh outfall as 3 and the "abandoned" outfall as 4.

CONCLUSION

This case does not merit further review by this Court. For the reasons given above, Stroh's Petition should be denied.

Respectfully submitted,

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